

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Second Application by BellSouth Corporation,)
BellSouth Telecommunications, Inc. and BellSouth) CC Docket No. 98-121
Long Distance, Inc. For Provision of In-Region)
InterLATA Services in Louisiana)

REPLY COMMENTS OF KMC TELECOM INC.
IN OPPOSITION TO BELL SOUTH'S APPLICATION FOR
INTERLATA AUTHORITY IN LOUISIANA

KMC Telecom Inc. ("KMC"), by undersigned counsel, hereby submits its Reply Comments in opposition to the second application filed by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. (collectively, "BellSouth") for in-region, interLATA authority in Louisiana. The comments filed in this proceeding demonstrate that BellSouth's application pursuant to Section 271 of the Communications Act, as amended ("Act"), suffers from numerous flaws that should prevent it from obtaining the interLATA authority it seeks.

I. **BELLSOUTH'S RELIANCE UPON RESALE COMPETITION IN THE RESIDENTIAL MARKET AND SERVICE BY PCS PROVIDERS DOES NOT SATISFY TRACK A.**

US WEST Communications, Inc. ("US WEST") and Ameritech Corporation ("Ameritech") insist that BellSouth has demonstrated that it is qualified for interLATA authority in Louisiana under Section 271(c)(1)(A) ("Track A"). The positions taken by US WEST and Ameritech, however, are contrary not only to the sound reasoning of most other commenters,¹ but also a reasonable reading

¹ See, e.g., AT&T, at 73-76; MCI, at 1-11; Competitive Telecommunications Association, at 21-29; e.spire, at 6-11; Association for Local Telecommunications Services, at 1-10; Telecommunications Resellers Association, at 12-24; Intermedia, at 3-6; State, at 4-5; Excel, at 2-4.

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of this statute. In short, these carriers – like BellSouth itself – rely inappropriately on the limited presence of resellers of residential service and PCS providers in claiming that BellSouth has satisfied Track A.

A. Like BellSouth, U S WEST Relies Upon an Erroneous Interpretation of Track A in its Comments.

Looking to the Evaluation filed by the Department of Justice ("DOJ") in the Southwestern Bell Oklahoma Section 271 proceeding, U S WEST asserts that a Bell Operating Company ("BOC") proceeding under Track A is not required to show that *both* residential and business subscribers are served by facilities-based competitors.² Instead, U S WEST believes that "the choice made by a facilities-based new entrant to provide service to only one class of customers, *i.e.*, business customers, but not to residential customers does not deprive the BOC of its ability to proceed under Track A."³ The DOJ's comments in the instant proceeding, however, show that the BOCs have misinterpreted the prior Oklahoma Evaluation. Specifically, DOJ has explained that the Addendum to its Oklahoma Evaluation:

stands only for the proposition that whether an individual provider is facilities-based is to be determined based upon that provider's activities as a whole, and that a provider does not have to be both facilities-based for business customers and facilities-based for residential customers to satisfy Track A. *It does not stand for the proposition that a facilities-based provider serving business*

² U S WEST, at 3-4 (citing Addendum to DOJ Oklahoma Evaluation, CC Docket No. 97-121 (May 21, 1997), at 3). BellSouth relied upon this same interpretation of the Department's Addendum in its application. *See* BellSouth Brief at 7-8.

³ U S WEST, at 4.

*customers and a reseller serving residential customers can be combined to meet the statutory requirements.*⁴

Because U S WEST's support for the Louisiana application is based upon an erroneous interpretation of the DOJ's Oklahoma Evaluation, the Commission should disregard U S WEST's glowing analysis of the state of local competition in Louisiana and its corresponding support of BellSouth.⁵ Moreover, since "'pure' resellers have primarily targeted residential customers" and "the carriers with some facilities of their own are primarily reselling business service" in Louisiana,⁶ it is clear that BellSouth has not succeeded in opening the residential market to entry by facilities-based carriers.

B. The Service Offered by PCS Providers is a Supplement to -- not a Substitute for -- Effective Wireline Competition.

Quoting the Commission's order in the prior BellSouth Louisiana Section 271 proceeding, Ameritech notes that: "a Section 271 applicant relying on a PCS provider as a 'facilities-based competitor' must show that the PCS provider 'offers service that both (i) satisfies the statutory definition of 'telephone exchange service' in section 3(47)(A) and (ii) competes with the telephone

⁴ DOJ Evaluation, at 7-8, n.13 (emphasis added).

⁵ It should be emphasized that BellSouth's assertion regarding KMC's supposed facilities-based service to residential customers was incorrect. BellSouth Brief, at 5. KMC provides facilities-based service to less than 30 *business* customers and *no residential customers* in Louisiana. Register Affidavit, at ¶ 4.

⁶ DOJ Evaluation, at 7.

exchange service offered by the applicant in the relevant state."⁷ Ameritech then devotes a significant portion of its comments to explaining how the service offered by a PCS provider is a "telephone exchange service."⁸ Notably, however, Ameritech never turns its attention to the more important part of the test it has quoted – whether the PCS providers in Louisiana in fact *compete* with BellSouth in providing local exchange service.

There is no basis for concluding that the five PCS carriers identified by BellSouth now provide effective facilities-based competition to BellSouth in Louisiana. Indeed, just six months ago, the Commission noted that PCS providers are still making the transition from "a complementary telecommunications service to a competitive equivalent to wireline services."⁹ Although BellSouth has pointed to two subsequent developments that U S WEST terms "dramatic,"¹⁰ these "developments" are hardly compelling. The first "development" is simply a quote from the Commission's Wireless Bureau that largely mirrors the Commission's acknowledgment of the transitional state of PCS technologies in its February *Louisiana Order*.¹¹ The second "dramatic

⁷ Ameritech, at 2-3 (quoting *In the Matter of Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Louisiana*, Memorandum Opinion and Order, 13 FCC Rcd 6245, 6290 (1998) ("*Louisiana Order*"), at ¶ 73).

⁸ Ameritech, at 3-8.

⁹ *Louisiana Order*, 13 FCC Rcd at 6290, ¶ 73 (citations omitted).

¹⁰ U S WEST, at 6.

¹¹ BellSouth Brief at 11-12.

development" comes in the form of a quotation from an advertisement by one PCS provider that asks customers to "make your wireless phone your only phone."¹²

These "developments" certainly do not provide the kind of dramatic change of factual circumstances that justify considering PCS a substitute for BellSouth's wireline local exchange service. The vast majority of commenters point out that while PCS usage is growing, customers continue to consider it a supplement for wireline service rather than a substitute.¹³ Having failed to demonstrate that PCS providers qualify as competing carriers, BellSouth has not met the threshold requirements necessary to proceed under Track A.

II. BELLSOUTH IS MAKING IT DIFFICULT FOR CARRIERS TO PURCHASE CONTRACT SERVICE ARRANGEMENTS AT A WHOLESALE DISCOUNT.

BellSouth trumpets the fact that it has revised its Louisiana Statement of Generally Available Terms ("SGAT") to allow competitors the ability to resell its contract service arrangements ("CSAs") at a wholesale discount.¹⁴ While the SGAT amendment has been approved by the Louisiana Public Service Commission, BellSouth has not made the amendment terms readily available to competitors. KMC recently sought to amend its interconnection and resale agreement with BellSouth to reflect

¹² See *id.* at 12.

¹³ See, e.g., State, at 4-5; AT&T, at 76-78; Intermedia, at 5-6; Excel, at 2-4; Telecommunications Resellers Association, at 16-24; Association for Local Telecommunications Services, at 5-10; e.spire, at 11-13. MCI, at 6-11; Competitive Telecommunications Association, at 27-29.

¹⁴ BellSouth Brief, at 62.

that CSAs are available for resale at a wholesale discount.¹⁵ Rather than allowing KMC to simply amend its existing agreement, however, BellSouth proposed an entirely new resale agreement.¹⁶

KMC should not be made to accept onerous new terms and conditions simply because it wants to avail itself of the wholesale discount for CSAs contained in BellSouth's SGAT. BellSouth should not be allowed to leverage concessions from competitors who wish to access terms and services from the SGAT. As long as BellSouth conditions the availability of a wholesale discount for CSAs upon a competitor's willingness to renegotiate other contract terms, it should not be considered in compliance with item (xiv) of the checklist.

III. BELLSOUTH'S APPLICATION IS PREMISED UPON A MISUNDERSTANDING OF THE PUBLIC INTEREST STANDARD.

BellSouth argues that the "principal focus" of the Commission's public interest inquiry should look to the impact BellSouth could have in providing competitive in-region, interLATA services.¹⁷ In support of this contention, Ameritech now asserts that the long distance market "continues to be a highly concentrated oligopoly" and that "the entry of the Bell companies will inject a highly desirable dose of additional competition into that business."¹⁸ Yet the BOCs' assertion regarding the lack of competition in the long distance market ignores the factual circumstances in each market. As the DOJ's expert, Dr. Schwartz, has explained, "[t]he interLATA

¹⁵ Menendez Affidavit, at ¶ 4 (provided as Attachment A).

¹⁶ *Id.* at ¶ 5.

¹⁷ BellSouth Brief, at 75-76.

¹⁸ Ameritech, at 16.

market is substantially more competitive [than the local market] (though certainly not perfectly competitive) and largely unregulated. . . . By contrast, the local market is largely a regulated monopoly rife with distortions."¹⁹ It would therefore make more sense from a public interest perspective to focus the competitive analysis on the local exchange market.

The BOCs' position that the "public interest" inquiry should focus primarily upon the long distance market rather than the local market is also legally incorrect. This argument has already been rejected by the Commission, which held in evaluating the Section 271 application of Ameritech Michigan that:

We reject the view that our responsibility to evaluate public interest concerns is limited to assessing whether BOC entry would enhance competition in the long distance market. We believe that our inquiry must be a broader one. The overriding goals of the 1996 Act are to open all markets to competition.²⁰

The record in this proceeding confirms that BellSouth has the power to exert an extraordinary amount of influence over the success or failure of its local exchange competitors by virtue of the manner in which it provisions resale, interconnection, access to unbundled network elements, and other items detailed in the Competitive Checklist. Before finding that BellSouth's entry into the interLATA market would be consistent with the public interest, convenience and necessity, the

¹⁹ DOJ Evaluation, Exhibit 2, at 8.

²⁰ *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, Memorandum Opinion and Order, 12 FCC Rcd 20543, 20745-46 (1997), at ¶¶ 386-87. ("*Ameritech Michigan Decision*").

Commission must have some assurance that BellSouth will not improperly use its monopoly power to impair or impede competition in the local exchange market. In the *Local Competition Order*, the FCC recognized that "incumbent LECs have little incentive to facilitate the ability of new entrants, including small entities, to compete against them."²¹ The FCC also acknowledged that incumbent LECs have the incentive and ability to engage in many kinds of discrimination. The prospect of interLATA entry provides a powerful incentive for BellSouth to open its local exchange markets to competition that would not be present otherwise.²²

IV. CONCLUSION

For the foregoing reasons, KMC respectfully renews its request that the Commission deny as premature BellSouth's application for interLATA authority in the state of Louisiana.

Respectfully submitted,



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Dated: August 28, 1998

²¹ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 15656 at ¶307.

²² *See Ameritech Michigan Decision*, 12 FCC Rcd at 20551, ¶14.

ATTACHMENT A

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)	
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InterLATA Services in Louisiana)	

**AFFIDAVIT OF
DONALD J. MENENDEZ**

State of Georgia)	
)	SS
County of <u>CWINNETT</u>)	

I, Donald J. Menendez, being first duly sworn, do hereby depose and state as follows:

1. I am the Director, Cost Engineering of KMC Telecom Inc. ("KMC"). KMC provides competitive local exchange service on both a facilities and resale basis in Baton Rouge and Shreveport, Louisiana.

2. I am submitting this affidavit to provide information relating to recent interaction between KMC and BellSouth regarding the resale of contract service arrangements ("CSAs"). Although BellSouth now claims that it is making CSAs available for resale at a discount in Louisiana, the Federal Communications Commission should be aware of how BellSouth is in fact conditioning the availability of such CSAs upon its competitors' willingness to accept other terms and conditions.

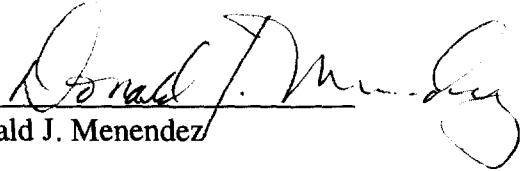
3. In considering BellSouth's prior application for interLATA authority pursuant to Section 271, this Commission found that BellSouth's failure to make CSAs available for resale at a discount was inconsistent with the Competitive Checklist. As BellSouth explains in its Brief in this proceeding, the Louisiana Public Service Commission subsequently approved a BellSouth amendment to its Statement of Generally Available Terms ("SGAT") allowing for the resale of CSAs at a wholesale discount.

4. Following the Louisiana Public Service Commission decision, I requested that BellSouth make CSAs available for resale to KMC at the wholesale discount, consistent with the revised SGAT.

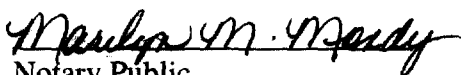
5. On July 14, 1998, BellSouth sent a letter to my attention, which proposed to replace the existing resale agreement between BellSouth and KMC with an amendment that provided "for the resale of CSAs at the prescribed discount in all states." The proposed amendment did not, however, simply add CSAs to the list of service offerings available for resale at the wholesale discount. Instead, BellSouth's "amendment" consisted of an entirely new resale agreement with different terms and conditions. Among other things, BellSouth has proposed: (i) deleting the requirement that it provide resold services at parity; (ii) adding a section that would compel KMC to pay for OSS interfaces developed by BellSouth; and (iii) requiring KMC to pay an undefined amount for "[a]ll costs incurred by BellSouth for providing service requested . . . that are not covered in the BellSouth tariffs." None of these items are elements of the present agreement between the parties.

6. I sent a letter back to BellSouth's Interconnection Services Manager on August 4, 1998, indicating that KMC did not want to negotiate and execute a new resale agreement in its entirety. Instead, KMC simply wants to update its existing resale agreement to reflect the resale of CSAs at a discount without modifying any other provisions of the contract. We have not yet heard back from BellSouth.

7. The foregoing statements are true and correct to the best of my knowledge and belief.


Donald J. Menendez

Signed and sworn to before me this 26 day of August, 1998.

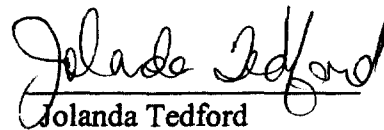

Notary Public

My Commission expires: 8/3/2002

CERTIFICATE OF SERVICE
DOCKET NO. 98-121

I, Jolanda Tedford, hereby certify that a copy of the foregoing **REPLY COMMENTS OF KMC TELECOM INC. IN OPPOSITION TO BELL SOUTH'S APPLICATION FOR INTERLATA AUTHORITY IN LOUISIANA**, was sent to each of the following parties by regular mail on this 28th, day of August, 1998.

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